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Unclear Hostility: Supreme Court Discussions of "Hostility to Religion" from *Barnette* to *American Legion*

MARK SATTA†

ABSTRACT

Appeals to "hostility to religion" have been a regular part of the Supreme Court's First Amendment jurisprudence for the last eighty years, but in all that time the Court has never provided a clear explanation of what constitutes "hostility to religion." This lack of explanation has recently become increasingly troubling given the significant role that the concept of "hostility to religion" has played in several high-profile Supreme Court decisions within the last two years, including *Masterpiece Cakeshop v. Colorado*, *Trump v. Hawaii*, and *American Legion v. American Humanist Association*. In this paper, I provide a thorough and detailed history of the Court's appeals to "hostility to religion." Through the lens of that historical examination of the Court's use of the concept of "hostility to religion," I argue that the Court has come to use "hostility to religion" ambiguously to mean both the broad category of anything that fails to be neutral toward religion and the narrower category of specifically that which exhibits active animosity toward religion. I argue that this ambiguity has resulted in confused outcomes and may contribute to ratcheting up the culture wars. I further argue that the best remedy is for the Court to be clearer and more judicious in its appeals to "hostility to religion" going forward. I offer four suggestions for how the Court can do so.

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INTRODUCTION

Over the past eighty years, many of the Supreme Court's most influential cases concerning the First Amendment's protection of freedom of religion have contained at least one statement by a justice expressing the view that something was or was not "hostile to religion" (or some variation thereof). However, in all of these opinions the justices have almost never paused to clarify what they mean by "hostility to religion." As is often the case when a phrase is used frequently and reflected upon seldomly, the phrase "hostility to religion" (and cognate phrases like "hostile toward religion," "exhibiting religious hostility," etc.) has meant different things when used by different justices.[1] But the justices have routinely failed to acknowledge or account for such discordant uses. As a result, appeals to "hostility to religion" based on Supreme Court precedent have become overly malleable and easily weaponized for partisan ends. This paper seeks to clarify matters by providing (1) a detailed history of the Court's use of phrases like "hostility to religion," (2) a descriptive examination and analysis of the ambiguous and inconsistent ways in which the Court has used such phrases, and (3) a prescriptive account of what the Court ought to do moving forward.

Historically, claims of hostility to religion have rarely been determinative in the outcome of the case. But, in recent years, that has changed. Issues over whether law-making or law-enforcing behavior exhibits hostility toward religion have been determinative in the outcome of several important cases. The most recent case where the concept of "hostility to religion" clearly determined the outcome was the 2018 case *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). In *Masterpiece,* the Court vacated a Colorado Court of Appeals ruling that a

1. Throughout this paper, I will treat the phrases "hostile to religion," "hostility toward religion," "religious hostility," and similar phrases as synonymous and interchangeable.

baker had violated the Colorado Anti-Discrimination Act by refusing to make a wedding cake for a same-sex couple.[2] The Court did so on the grounds that adjudicators in Colorado had exhibited hostility toward the baker's religious beliefs during the appeals process. That baker later sued the state of Colorado on the basis that Colorado displayed hostility toward his religious beliefs.[3]

But the concept of hostility to religion has played a significant role in cases even more recent than *Masterpiece*. Had the primary dissent in a second 2018 case, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), been the majority, charges of hostility toward religion would have proved determinative for a second time in the Court's 2018 decisions. In *Hawaii*, while a majority of five upheld President Donald Trump's immigration restrictions placed on several Muslim majority countries, the primary dissent, penned by Justice Sonia Sotomayor, expressed the view that these restrictions should be struck down on First Amendment grounds due to the hostility Trump had displayed toward members of the Muslim faith in advocating for his "travel ban" during his campaign for president.[4]

Most recently, on June 20, 2019, in *American Legion v. American Humanist Association*, the Court's majority appealed to the concept of hostility to religion in ruling that the presence of a ninety-year-old World War I memorial in the form of a 32-foot Latin cross on public land in Maryland did not violate the Establishment Clause.[5] In determining that the cross ought to remain on public land, the majority reasoned that taking down monuments with religious symbolism "will strike many as aggressively hostile to

2. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

3. Masterpiece Cakeshop Inc. v. Elenis, No. 1:18-cv-02074-WYD-STV, at *45–46 (D. Colo. Jan. 4, 2019).

4. Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

5. American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

religion."[6]

As the examination of these and other cases will show, the Supreme Court has vacillated between two distinct meanings of what constitutes "hostility towards religion" in its First Amendment jurisprudence. Given the increasing significance charges of hostility to religion are playing in the outcomes of constitutional cases concerning religion, it is important that this ambiguity is identified and that greater attention be given to what is meant by "hostility to religion." It is also important to devote more careful reflection on what the Court should mean by "hostility toward religion" which heretofore has been a largely neglected topic. This paper is an attempt to make progress toward these goals.

This paper has four theses. First, phrases like "hostility to religion" have been used ambiguously by the Court. Sometimes, by "hostility to religion" the justices mean something akin to "disfavor toward religion." At other times, by "hostility to religion" the justices mean something akin to "animosity toward religion."

Second, and related to the first, due to this ambiguity, phrases like "hostility to religion," when used in legal opinions, can neither accurately be described simply as technical terms—i.e. as legal terms of art—nor can they accurately be described as simply in keeping with the ordinary language usage of such phrases. The Court's ambiguous treatment is the root of this state of affairs. Sometimes the Court has strayed far from ordinary language meaning of "hostility" in the context of religion and treated "hostility" akin to a technical term. But at other points justices have leaned into the ordinary, everyday meaning of "hostility" in claiming that something does or does not constitute hostility to religion.

Third, these ambiguous uses have caused confusion and strife; both in the Court's opinions and in the general public

6. *Id.* at 2084–85.

consciousness. Fourth and finally, the best way to eliminate this confusion is to use the phrase "hostility to religion" only when one means "animosity toward religion" and to use other phrases like "disfavoring religion" or "inhibiting religion" to identify instances where actions or policies may harm or marginalize religion, but through a means that contains no animosity or spite toward religion.

The bulk of this paper is devoted to thoroughly covering the history of the Supreme Court's usage of phrases like "hostility to religion," "religious hostility," and "hostile toward religion." Simultaneous to this presentation of the history, I will also be making my case that the Court's appeals to "hostility toward religion" have been ambiguous. I argue that this ambiguity has been harmful because (1) it has muddied Supreme Court religious freedom jurisprudence, and (2) it has helped foment the culture wars over the role of religion in the United States. I close by offering four proposals for how to talk about hostility to religion going forward that will help make the Court's jurisprudence clearer, more accurate, and more effective, which might ultimately help ratchet down the culture wars concerning religion's role in America.

In this paper, I make claims about how the Court's use of phrases like "hostility toward religion" do or do not reflect ordinary language usage of the word "hostility." Thus, I should say something about what I take the ordinary meaning of the word "hostility" to be. I take it that the word "hostility," as used in everyday English, conveys a strong negative attitude toward the object one is hostile toward. Being hostile isn't the sort of thing one can be casually. Rather, hostility requires a strong commitment and emotional opposition to the object of one's hostility.

This understanding aligns with how lexicographers define the words "hostile" and "hostility." For example, the first lexeme provided for the word "hostile" in the Oxford English Dictionary Online is "[o]f, pertaining to, or characteristic of an enemy; pertaining to or engaged in actual

hostilities" and the secondary definition is "unfriendly in feeling, action, nature, or character; contrary, adverse, antagonistic."[7] Like most words, "hostility" contains a range of connotations depending on the perspective of the speaker or hearer as well as on the context of utterance. This range is exhibited with the milder characterization of hostility as "unfriendly in feeling" to the stronger characterizations as "antagonistic" and "characteristic of an enemy."

I take these stronger characterizations to predominate in most contexts, as is evidenced by Merriam-Webster's definition of hostility as "deep-seated usually mutual ill will" and as "conflict, opposition, or resistance in thought or principle." The synonyms Merriam-Webster provides for "hostility" are "animosity, animus, antagonism, antipathy, bad blood, bitterness, enmity, gall, grudge, jaundice, rancor."[8] All these words convey strongly negative sentiments that are held with conviction and deep feeling. Thus, hostility as used in ordinary English is constituted by a certain kind of intention that tends to result in actions aimed at thwarting, undercutting, or harming the object of hostility (both Merriam-Webster and the Oxford English Dictionary note the connection between "hostility" and "war"). In our examination of the differing claims of "hostility to religion" we will see that some justices lean into the strong negative attitude aspect of "hostility" while others seem to treat "hostility" as referencing a much wider class of oppositional stances one can take.

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7. *Hostile*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

8. *Compare id. with Hostility*, MERRIAM-WEBSTER, https://www.merriam webster.com/dictionary/hostility (last visited Mar. 20, 2020).

VIDAL TO *ENGEL* (1844 TO 1962)

The 1844 case *Vidal v. Philadelphia* is the first time a reference of hostility to religion appears in a Supreme Court opinion.[9] In *Vidal*, the Court considered whether the will of a deceased millionaire that called for his fortune to be used to build a school for orphans, which barred "ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college," violated Pennsylvania public policy.[10] In writing for the Court, Justice Joseph Story made a single reference to hostility in paraphrasing the argument of the plaintiffs. Story wrote that,

> This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania.[11]

While Story doesn't elaborate on what either the plaintiffs meant by hostility or what the Court took it to mean, he and his colleagues were unconvinced by the plaintiff's arguments. The Court voted unanimously that the will did not violate public policy, mostly because of how limited they determined the harm to Christianity to be (Story points out that Christianity and scripture could still be taught at the school; it simply couldn't be taught by teachers who were religious leaders by vocation).[12]

It was nearly one hundred years until another reference to hostility to religion made its way into a Supreme Court opinion. The concept had a rather ignoble reintroduction as a comment in Justice Felix Frankfurter's much criticized dissent in *West Virginia Board of Education v. Barnette*.[13]

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9. Vidal v. Girard's Executors, 43 U.S. 127, 197 (1844).

10. *Id.*

11. *Id.*

12. *Id.* at 197–98.

13. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 654 (1943)

Frankfurter wrote that "[t]he essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility" and that "[r]eligion is outside the sphere of political government."[14] He made these comments in service of the following conclusion.

> An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.[15]

His claims about religion were meant to serve as a contrast category for the point he wanted to make about national allegiance. Frankfurter's views about forced expression of national allegiance have failed to make it out of his dissent and into future majority opinions, but the contrasting claims he made about religion represent the first articulation in a Supreme Court opinion of a now commonplace part of Establishment Clause jurisprudence.[16]

Frankfurter's primary concern in his analogy seemed to be that it would be unconstitutional for a religion to receive the same kind of support from that state that he was advocating views about national allegiance should receive. But in doing so Frankfurter sensibly noted that, just as the government cannot improperly put a thumb on the scale in favor of religion, so too it cannot improperly put a thumb on the scale against religion either. Frankfurter's recognition that the state can express neither support nor hostility

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(Frankfurter, J., dissenting).

14. *Id.*

15. *Id.* at 654–55.

16. I speak of the Establishment Clause and Free Exercise Clause as two related, but separate entities. However, I don't believe anything I say here turns on this. One could just as easily see non-establishment and free exercise as two aspects of the same provision.

toward religion is a prototypic pronouncement that the Establishment Clause requires that the government act neutrally toward religion, with neutrality requiring neither favoring nor disfavoring religion (either a particular religion or religion generally).

The phrase "hostility to religion" gained its first reappearance in a majority opinion just five years later in Justice Hugo Black's opinion in *Illinois ex rel. McCollum v. Board of Education*, where Black wrote:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.[17]

Like Story and Frankfurter, Black doesn't tell us what he means by hostility to religion. Rather he only gives us an example of what does not count as "manifesting a governmental hostility to religion" and sensibly points out that hostility to religion on behalf of the government is incompatible with the free exercise of religion of that government's citizens. Because Black does not explain what he means by "hostility," it seems most prudent to assume he had the everyday usage of the term, as it was used in his day, in mind.

There are two other points worth making about Black's comments. First, like Story, his discussion of hostility to religion seems to have been prompted by the arguments of the petitioners. This continued to happen with regularity in the years that followed. Advocates of expansions of religious free exercise rights seem to gravitate toward the argument that the perceived infringements on those rights are instances of hostility to religion. These claims often fail, as they did in *McCollum*, but they often succeed as well, as we

17. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948).

will soon see.

Second, Black talks about whether the hostility would be made "manifest". Something is manifested when a reasonable observer can conclude that the thing manifest is present. Thus, for hostility to be made manifest, in the ordinary usage of such a phrase, a reasonable observer can conclude that the conscious enmity or desire to undercut the object of hostility is present on behalf of the hostile subject. Some of the conflict we've seen in more recent years over claims of hostility to religion seem best viewed as substantive differences of opinion concerning which actions reasonably reveal hostility to religion. This is easy to understand if we think about the deep emotional and personal feelings many of us have toward religion (whether those feelings be positive, negative, or mixed). How different justices and commentators have made these assessments is something worth paying attention to as we examine subsequent cases.[18]

Over the next decade and a half, a couple more references of hostility toward religion were made in keeping with the ones that preceded. In the 1952 case *Zorach v. Clauson*, Justice William O. Douglas, writing for the majority, put into more straightforward language a principle that was latent in the comments that had come before; writing that "we find no constitutional requirement which makes it necessary for government to be hostile to religion" and that "[w]e cannot read into the Bill of Rights such a philosophy of hostility to religion."[19] The idea here, which can

18. The language of manifesting hostility also appears in Wallace v. Jaffree, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) ("To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion.") and McDaniel v. Paty, 435 U.S. 618, 636 (1978) (Brennan, J., concurring) (stating that the Tennessee law which excluded ministers from holding public office "manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion.").

19. Zorach v. Clauson, 343 U.S. 306, 314–15 (1952).

be read out of Frankfurter's and Black's comments, is that the Establishment Clause requires detachment from religion only up until the point that neutrality is achieved, but not so far that the actions of government begin actively undercutting or showing enmity toward religion.

In the seminal 1962 case *Engel v. Vitale*, Black in his majority opinion again responds to the argument of a party by rejecting their claim that the action under question represented government hostility to religion in writing that "[i]t has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong."[20] But of greater significance for the development of discussion of hostility to religion in the Court's First Amendment jurisprudence is Douglas's statement in concurrence that "[t]he First Amendment leaves the Government in a position not of hostility to religion but of neutrality."[21] This statement is a variant of Frankfurter's "no religion shall either receive the state's support or incur its hostility." There Frankfurter articulates two things that religion should *not* receive from the state. Here, Douglas states what religion should receive instead: neutrality.

These first five cases provide us with many of the seeds for the cumbersome weedy row that talk of hostility to religion has grown into in Supreme Court First Amendment jurisprudence. These cases also laid the groundwork for the Supreme Court's first prolonged engagement with the concept in 1963 in *School District of Abington Township v. Schempp*. Note that in all the cases we've encountered so far none of the justices have clarified what they mean by "hostility to religion." As previously stated, it seems reasonable to conclude that the justices saw themselves as

20. Engel v. Vitale, 370 U.S. 421, 433–34 (1962).

21. *Id.* at 443.

using the word "hostility" in its ordinary usage in the absence of stating otherwise. However, as is often the case with words that are found in pithy Court maxims like "no religion shall either receive the state's support or incur its hostility," "we cannot read into the Bill of Rights such a philosophy of hostility to religion," and "the First Amendment leaves the Government in a position not of hostility to religion but of neutrality," in subsequent contexts such maxims and their component parts begin to take on a life of their own, where their future meaning is shaped by the previous contexts of use in Court opinions alongside new applications. This process appears to have started for the word "hostility" as used in First Amendment jurisprudence in the context of "hostility to religion" in *Schempp*. In covering what the justices had to say about hostility to religion in the case, I will provide my reasons for this view.

SCHEMPP TO *ALLEGHENY COUNTY* (1963 TO 1989)

In *Schempp* the Court considered two consolidated cases; both dealing with the constitutionality of required Bible reading in school.[22] An eight-member majority determined that such a requirement violated the First Amendment.[23] Justice Tom Clark writing for the majority referenced hostility to religion only in passing in the following:

> We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect.[24]

This quick reference seemed to have served only to stake a position in a discussion that occurred within *Schempp*'s concurrences and dissent.

Justice William Brennan wrote a lengthy concurrence in *Schempp* where he discussed, among other things, the "settled" position "that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide" questions related to things like "internal ecclesiastical disputes" and the "subject of the doctrinal theology."[25] Because Douglas had contrasted neutrality to religion with hostility to religion the year before, it makes sense that Brennan might do the same, and he did in fact do so. In discussing the case of *Ballard v. United States*, the 1944 mail fraud case in which the Court held that the First Amendment barred Courts from assessing the truth of a religious belief, Brennan wrote the following:

> The case [*Ballard*] shows how elusive is the line which enforces the

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22. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

23. *Id.*

24. *Id.* at 225 (internal citation omitted) (quoting *Zorach*, 343 U.S. at 314).

25. *Id.* at 243 (Brennan, J., concurring).

> Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion—a line which must be considered in the cases now before us. Some might view the result of the *Ballard* case as a manifestation of hostility—in that the conviction stood because the defense could not be raised. To others it might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility.[26]

Brennan closed his discussion of this topic by stating that "[f]reedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases."[27]

Brennan's point that the line between neutrality and lack of neutrality can be elusive has been validated by the hair-splitting that has occurred at points in Supreme Court First Amendment religious freedom jurisprudence. But if we are keeping in mind the ordinary language usage of hostility as containing "ill will," "enmity," or "antagonism," it does not seem at all clear that the line between neutrality and hostility is elusive, for hostility is a far cry from neutrality. This is not to say there won't be some circumstances where hostility is cleverly disguised such that it is hard to tell the difference between hostility and a "strict adherence to the principle of neutrality." Rather it is to say that ordinarily, in the absence of deception, neutrality and hostility do not border one another.

How are we to make sense of what Brennan has done here? I think the answer comes in at least two parts. First, Brennan is talking about *perceptions* of hostility and neutrality as much as he is about actual instances of neutral behavior and hostile behavior. And as the strong disagreements that exist within society as to what constitutes neutrality to religion versus hostility to religion show, Brennan certainly has a point that the same decision

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26. *Id.* at 245–46.

27. *Id.* at 246.

can easily be viewed as being neutral by some audiences and hostile by others, depending on their perspective. But he is not merely talking about perceptions of neutrality and hostility. He also seems to be talking about the concepts of neutrality and hostility themselves. The other part of the explanation for what Brennan has said here is that, building upon the uses of the term "hostility" in earlier opinions, Brennan has expanded the ordinary definition of hostility in the context of "hostility to religion" to encompass the entire range of instances in which the thumb is on the scale against religion. This expansion takes "hostility" a step away from its ordinary meaning and into a kind of quasi-technical role in the context of religious freedom jurisprudence.

Brennan doesn't appear to have been alone at the time in making this expansion. Justice Arthur Goldberg wrote in a separate concurrence, joined by Justice John Marshall Harlan II, that "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[28] Goldberg makes an astute observation that "untutored" devotion to neutrality can lead to overzealousness and overexpansiveness in enforcement. However, when it comes to hostility itself, Goldberg's discussion of "passive, or even active, hostility" may sound odd if one has the ordinary meaning of "hostility" in mind. Hostility in its ordinary guise is active—it's combative, antagonistic, warlike. It's not passive. Yet, Goldberg's construction reads as if passive hostility is the default, and active is the exception. Disdain can perhaps be passive, in the sense that one shows so little value or respect for the object of one's disdain that they give little thought or consideration to the object. But hostility is more than mere

28. *Id.* at 306 (J. Goldberg, concurring).

disdain.

How are we to make sense of Goldberg's worry that we may accidentally slip into hostility toward religion? I think the answer is that Goldberg had the expansive, somewhat technical definition of "hostility" that Brennan had—i.e. hostility as encompassing the entire range of situations where religion is inappropriately stifled, inhibited, or disfavored. With this expansive definition in mind, Goldberg's treatment of passive hostility as the default is a recognition that most circumstances in which one begins inhibiting religion because of overeager enforcement of neutrality toward religion are going to be instances where one is passive in their desire to inhibit religion itself. The focus, after all, in such cases is neutrality, not religion. And the recognition of "even active" hostility is keeping open the possibility that this overzealous enforcement of neutrality could, on occasion, go so far as to constitute an active inhibition of religion, where inhibition of religion becomes the new object (or can rightfully be perceived as such). But it is important to keep in mind that this circumstance seems to be the exception, not the norm.

The lone dissenter, Justice Potter Stewart, also adopted this expansive understanding of religious hostility, this time via Black's opinion in *McCollum*. Stewart begins by appeal to the 1947 *Everson v. Board of Education* case, which did not appeal to hostility to religion in its analysis.[29] Stewart wrote that "there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion," which he characterized using *Everson*'s language that "[s]tate power is no more to be used so as to handicap religions than it is to favor them."[30] Here, we see again the recognition that a failure to be neutral can be

29. There was reference to "general hostility to dissentient groups," but this does not seem to have carried any substantive weight in the analysis. *See* Everson v. Bd. of Educ., 330 U.S. 1, 36 (1947).

30. *Schempp*, 374 U.S. at 311 (Stewart, J., dissenting) (quoting *Everson*, 330 U.S. at 18).

either positively-valenced in favor of religion or negatively-valenced to disfavor religion (e.g. to "handicap religions").

But Stewart does not stop there. He then states that "this Court recognized that the limitation was one which was itself compelled by the free exercise guarantee."[31] Stewart then concludes with Black's language from *McCollum* that a manifestation of hostility to religion would "be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."[32] Stewart went out of his way, not only to connect Establishment Clause jurisprudence with Free Exercise Clause jurisprudence, but to link the general disfavor of religion expressed as handicapping in *Everson* with hostility as used in *McCollum*.

Over the next twenty years, speaking of "hostility to religion" as consisting of anything on the negative side of neutrality toward religion was continually cemented and reshaped into new pithy and repeatable constructions. It became commonplace, as Professor Frank Ravitch put it, to "treat hostility and lack of formal neutrality as two sides of the same coin."[33] For example, in the 1968 case *Epperson v. Arkansas*, Justice Abe Fortas writing for the majority wrote that government "may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even

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31. *Id.*

32. *Id.* at 311–12 (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948)).

33. Frank S. Ravitch, *The Supreme Court's Rhetorical Hostility: What is "Hostile" to Religion Under the Establishment Clause?* 2004 B.Y.U. L. REV. 1031, 1034 (2004). My claims are somewhat stronger than Ravitch's, who wrote that "the Court seems poised to treat" neutrality and lack of hostility as two sides of the same coin. *Id.* I agree that the Court is so poised, but it seems to be that the Court has in fact adopted this position and held to it for quite some time. However, I am also arguing that this is not the only way in which the Court has characterized and used the concept of hostility in the context of freedom of religion. Ravitch rightly noted, with appropriate disapproval, of the separation between this technical use of "hostility" as non-neutrality and what he calls treatment that is actually hostile.

against the militant opposite."[34] He also wrote that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[35] Here, Fortas nuances what counts as favor of religion, listing that the government must not "aid, foster, or promote" religion. But he does not do the same in considering what counts as disfavoring religion. Rather, he keeps "hostility" to religion as the blanket expression for the whole category of disfavor toward religion.[36]

Note that through all of this, we have yet to see an instance where a justice explained what they meant by hostility to religion, other than via contrastive references to neutrality (and Goldberg's language implying that hostility can be passive or active). Rather, what we get is repetition of principles and applications of those principles to new situations. Most were attempts to further define either

34. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

35. *Id.* at 103.

36. In the years since *Epperson*, courts have continuously appealed to the language of *Epperson* and *Schempp*. *See generally* Bowen v. Roy, 476 U.S. 693, 708 (1986) (contrasting hostility with neutrality); Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (holding that a prohibition against wearing a yarmulke while in uniform in United States air force was "based on a neutral, completely objective standard—visibility" and "was not motivated by hostility against, or any special respect for, any religious faith"); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 554 (1986) ("The Establishment Clause mandates state neutrality, not hostility, toward religion."); Aguilar v. Felton, 473 U.S. 402, 420 (1985) (Burger, C.J., dissenting) (stating that barring the program in question show not neutrality but instead "nothing less than hostility toward religion and the children who attend church-sponsored schools"); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 306 n.32 (1985) ("The District Court found no evidence that the Department was acting on the basis of hostility to petitioners' religious beliefs."); Marsh v. Chambers, 463 U.S. 783, 802 (1983) (quoting *Epperson*, 393 U.S. at 103–04) (citing *Schempp*, 374 U.S. at 232–34, 243–53 (Brennan, J., concurring)) (discussing hostility towards religion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 793 (1973) (contrasting hostility with neutrality); Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting) (quoting *Epperson*, 393 U.S. at 103–04) (calling for government to be neutral and stating that it "may not be hostile" and "may not aid, foster or promote" religion); Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment").

(1) the boundary between neutrality toward religion against support, favor, aid, promotion, etc. or (2) neutrality toward religion against handicapping, disfavoring, being hostile to, etc. However, during this process there were a few points at which justices provided additional nuance as to how they understand hostility toward religion.

For example, in the 1970 case *Walz v. Tax Com. Of New York*, Chief Justice Warren Burger stated that "hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive."[37] While this does not define "hostility," it does identify certain forms that hostility can take and seems to characterize "harshly oppressive" hostility as an outlier. This all seems in keeping with the interpretation of "hostility" as any kind of disfavor toward religion.

And in *Lynch v. Donnelly*, a 1984 case where the Court addressed whether a nativity scene included as part of a city Christmas display violated the First Amendment, Burger, again writing for the Court, introduced the new maxim that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[38] This maxim would appear to expand the set of things that religious hostility is contrasted with. Rather than seeing hostility as anything that is non-neutral to religion in a negative way, Burger's maxim seems to imply that anything that falls short of accommodation of religion is hostility to it.[39]

This pushes the understanding of hostility as used by the Court even further from the ordinary meaning of hostility. In most cases there are many ways in which we can fail to accommodate something without being hostile to it. In fact,

37. Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 673 (1970).

38. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

39. The relationship between "neutrality" and "accommodation" is another topic in Establishment Clause jurisprudence highly worthy of study, but would be a digression to pursue in depth at this time.

being neutral to something seems to be a state compatible with failing to accommodate something. Think, for example, of a dentist's office that has a policy which says that anyone more than ten minutes late to their appointment won't be seen. Let's say I'm in a meeting that runs late. After the meeting lets out, I call the dentist's office on my way, letting them know I'll likely be more than ten minutes late, and ask for an accommodation. The dentist's office denies me one. Here, they've failed to accommodate me, but it seems that they are merely treating me neutrally so long as they do not accommodate anyone else and that they are not exhibiting any disdain or animosity toward me.

Despite Burger's new maxim, just three years later in *Edwards v. Aguillard*, Justice Antonin Scalia reasserted the view of "hostility" to religion as equivalent to all unfavorable deviations from neutrality toward religion. In fact Scalia did so perhaps more explicitly than the Court had yet done, writing that "we have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to advance religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion" and that "we have said that governmental 'neutrality' toward religion is the preeminent goal of the First Amendment."[40] In doing so, Scalia links "hostility toward religion" with that which "disapproves" or "inhibits" religion. Disapproval of or inhibition of an object isn't synonymous with being hostile to an object in the ordinary sense of the word "hostile." But, after years of implicitly equating such terms within the context of First Amendment jurisprudence, Scalia was merely more explicitly identifying what the semi-technical phrase "hostility toward religion" had become.

With Burger's retirement from the bench in 1986, his push to expand the extent to which the Establishment Clause required accommodation (and the corollary push for

40. Edwards v. Aguillard, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting).

a wider range of activities to count as hostility to religion) may have continued to be overshadowed by the older view of hostility as anything non-neutral to religion. However, this more expansive view of what counted as hostility to religion (along with the expansive view of the Establishment Clause obligations to accommodate religion) found a new champion with the appointment of Justice Anthony Kennedy.

Kennedy first expressed his views on hostility to religion in First Amendment jurisprudence in the consolidated case of *Count of Allegheny v. American Civil Liberties Union*, where the Court held that a creche that was displayed alone at the Allegheny County Courthouse violated the First Amendment but that a Menorah that was part of a larger holiday display at the City-County Building did not.[41] Kennedy stated that the majority's opinion reflected "an unjustified hostility toward religion" and "a hostility inconsistent with our history and our precedents."[42]

Citing the majority opinions in *Lynch* and *Walz*, Kennedy argued that "rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society" and that "[a]ny approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious."[43] This is reminiscent of Burger's claim that the Establishment Clause does not require mere tolerance, but accommodation. Further, Kennedy's claim implies that the Establishment Clause does not bar aid to religion, which runs contrary to the view first announced in *Epperson* that government "may not aid, foster, or promote one religion or religious theory

41. County of Allegheny v. ACLU, 492 U.S. 573, 578–79 (1989).

42. *Id.* at 655 (Kennedy, J., dissenting).

43. *Id.* at 657.

against another."[44]

Later in his dissent, Kennedy circled back to the topic a second time to add that, "the ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between *accommodation* and establishment. Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so."[45]

In summary, Kennedy's view in *Allegheny* seems to boil down to the following two propositions. First, all the Establishment Clause requires is that the government neither coerce individuals to participate in religion nor provide direct benefit to religion such that a state religion is established (or would "tend" to be established). Second, anything short of accommodating and aiding religion borders on "latent hostility to religion." Thus, Kennedy carried forward Burger's expansive view of what constitutes hostility toward religion which, at least since the 1940s, seems to have been an outlier view.

Kennedy was the lone dissenter who thought that both displays were constitutional. (Justices William Brennan, Thurgood Marshall, and John Paul Stevens thought neither display was constitutional.) And his deviations from precedent were explicitly rejected by his colleagues. Justice Harry Blackmun, who penned the opinion for the Court wrote the following in response:

> Although Justice Kennedy repeatedly accuses the Court of harboring a "'latent hostility" or "callous indifference" toward religion, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd.

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44. *Id.* at 656 (quoting Epperson v. Ark., 393 U.S. 97, 105 (1968)).

45. *Id.* at 659 (emphasis added) (internal quotations omitted).

> Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.[46]

Not only did Blackmun reject Kennedy's conclusion about what constituted hostility to religion, he also fleshed out the rather uninspiring call for neutrality to religion as encompassing the more deeply held value of respect for diverse religions and as an obligation to allow for religious pluralism in a liberal democracy.

Similarly, Justice Sandra Day O'Connor in her concurrence praised the values of religious pluralism and rejected Kennedy's characterization of hostility to religion, writing that,

> Contrary to Justice Kennedy's assertions, neither the endorsement test nor its application in these cases reflects "an unjustified hostility toward religion." Instead, the endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others.[47]

However, O'Connor also expressed support for a view that was somewhat more expansive about what constituted neutrality to religion. A consequence of this would be a larger category of actions that would constitute hostility to religion if not permitted. O'Connor expressed this view, writing that,

> Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion. Instead the courts have made case-specific examinations of the challenged government action and have attempted to do so with the aid of the standards described by Justice Blackmun . . . .[48]

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46. *Id.* at 610 (majority opinion).

47. *Id.* at 631 (O'Connor, J., concurring) (citations omitted).

48. *Id.* at 623.

Justice John Paul Stevens also rebutted Kennedy's position at two different points in his own dissent. At one point, Stevens quoted Black's opinion in *Engel* at length, including the claim presented earlier that "[n]othing, of course, could be more wrong" than the view that "to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer."[49]

But of greater interest from the perspective of thinking about how hostility to religion ought to be viewed by the Court is Stevens' other rebuttal. Citing *Everson*, Stevens wrote that,

> The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence. Indeed in its first contemporary examination of the Establishment Clause, the Court, while differing on how to apply the principle, unanimously agreed that government could not require believers or nonbelievers to support religions.[50]

It is not obvious what exactly Stevens considers the "giant step backward" to be. My best guess is that it is the removal of the middle-ground space between support and hostility that had long been characterized as neutrality toward religion. Stevens very reasonably could have interpreted Kennedy as arguing that anything less than support for religion was hostility to religion, and this indeed would be a substantial deviation from precedent.

But there is a second way to understand this quote from Stevens—namely, as a recognition that hostility, understood in its everyday sense, is not a proper descriptor for anything that fails to comport with what the Establishment Clause guarantees. There are any number of incidental, accidental, or otherwise non-malicious ways in which religion can fail to

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49. *Id.* at 653 n.14 (Stevens, J., dissenting) (quoting Engel v. Vitale, 370 U.S. 421, 433–35 (1962)).

50. *Id.* at 652 n.11 (citing Illinois *ex rel* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

be supported or treated neutrally that do not seem to constitute hostility in the ordinary sense of that word. Even with the focus on hostility to religion that Kennedy's novel views on the matter provided, after nearly fifty years of hostility to religion playing a role as an important concept in First Amendment jurisprudence, still no justice had put forward a view as to what hostility was. But in *Allegheny*, Stevens supplied a new articulation of what it might not be.

CHURCH OF LUKUMI THROUGH 2017

In the years leading up to the sea change brought about by the Court's ruling in *Employment Division v. Smith*, where the Court held that valid laws of general applicability that burdened religion didn't violate the Free Exercise Clause so long as they passed the rational basis test, the bulk of the discussion concerning hostility to religion had been Establishment Clause cases.[51] However, the First Amendment religious freedom landscape after *Smith* created space for a new role for the concept of hostility to religion to play in free exercise cases.

In *Church of Lukumi Babalu Aye v. City of Hialeah,* the Court was faced with the question of whether a facially neutral (at least facially neutral according to the Court) ordinance prohibiting animal sacrifice violated the Free Exercise Clause because of the city's intent to suppress the ritual sacrifices of members of the Santeria religion.[52] Kennedy wrote the opinion of the Court from which no member dissented and relied heavily on the hostility the town exhibited toward the Santeria in articulating why the ordinance violated the Free Exercise Clause.

In doing so, Kennedy expanded on the Court's jurisprudence concerning hostility to religion in the free exercise context in two ways. First, he provided the new maxim that "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt."[53] This was an important move post-*Smith*, given that otherwise *Smith* would allow for suppression of religion and might incentivize those with such ambitions to attempt to do so as long as they were clever enough to think of a way to make their law appear neutral and generally applicable. The

51. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

52. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

53. *Id.* at 534.

Lukumi maxim gave the Court the necessary means to block such attempts.

Second, after fifty years of hostility to religion playing a substantive and recurring role in First Amendment jurisprudence, in *Lukumi*, Kennedy provides the first extensive presentation of evidence of hostility to religion. Kennedy's presentation of the hostility exhibited by the city of Hialeah and its residents is worth quoting at length.

> That the ordinances were enacted because of, not merely in spite of, their suppression of Santeria religious practice, is revealed by the events preceding their enactment. . . . The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers . . . . When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded.
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> Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "If we could not practice this [religion] in our home-land [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"
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> Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you . . . not to permit this Church to exist." The city attorney commented that Resolution 87-66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens . . . ." Similar comments were made by the deputy city attorney. . . .

> In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.[54]

Kennedy's choice of evidence, as well as his description of it, is important in several respects.

In most previous instances, the Court's First Amendment jurisprudence concerning the religion provisions and hostility had centered around the *consequences and effects* of the law. However, in *Lukumi* the evidence Kennedy provided of hostility to religion was by and large about the *motivations, attitudes, and expressions* of the officials and citizens of Hialeah. Far less attention is given to the consequences of the law (and even when consequences were focused on, this seemed to be for the purpose of providing confirmatory evidence about intentions). This focus on motivations and intentions was used to generate Kennedy's conclusions that the *object* of the ordinances was suppression of religion, that the ordinances *targeted* religious belief, and that they disclosed *animosity* toward the Santeria. Yet, despite these differences between the analysis in *Lukumi* and previous analyses of hostility to religion, Kennedy retains the pairing of hostility with neutrality in concluding that "the ordinances are not neutral." What are we to make of all this?

Several things are worth noting. First, *Lukumi* represents one of the clearest instances where hostility to religion is present in the everyday usage of the word hostility. Kennedy's identification of the evidence showing *animosity* is very fitting here. But, such talk of animosity

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54. *Id.* at 542.

strikes me as something that would have been out of place had it been used in a number of the other cases that dealt with "hostility toward religion." In this case, it doesn't make sense to treat "hostility" as on a par with all that which "disapproves" or "inhibits" religion as Scalia implied in *Aguillard* or with all that "handicaps" religion as Stewart suggested in *Schempp*. No, what Kennedy identifies seems to be something a good deal stronger.

One way of viewing the matter is to conclude that, while the thing Kennedy identified in *Lukumi* is something stronger than what is identified as "hostility" in these other cases, this is only because the hostility in *Lukumi* happened to be particularly egregious and as a result was characterized using different terms. On this view, at the end of the day, all Kennedy's uses of "hostility" remain synonymous, even if they are described in different ways based on the context of identification. The consequence of this view is that a very large number of instances where the government fails to accord as much support for religion as Kennedy sees fit are instances of the government behaving with animosity toward religion. This strikes me as a warped conclusion, so perhaps it is better to conclude instead that Kennedy has two different senses of hostility in mind: the one which is used as a contrastive term to neutrality or accommodation, and the other which is used for instances of a motivation to suppress religion or an animosity toward religion. I think the evidence as to Kennedy's view in *Lukumi* is underdetermined.

However, the conceptual point is much clearer. Not all instances that fail to be neutral toward religion (and certainly not all instances that fail to accommodate or aid religion) are instances of animus toward religion. If that conflation is the view we impute to the Court, we are imputing to them a rather obvious falsity, and I think it is best to avoid doing so unless the evidence is compelling. For this reason, I think the best conclusion is that post-*Lukumi*, the Court has two distinct uses of the term hostility that it employs. The first use is a semi-technical term of art used to

pick out all instances in which religion is not treated neutrally (or not supported or accommodated, on the more expansive Burger-Kennedy view). This sense of "hostile to religion" serves the same role as phrases like "disfavors religion" and "inhibits religion." The second sense of "hostility" is the everyday sense of the term which is roughly synonymous with "animosity."

There also seems to be a divide in usage depending on the ideology of the justice. The technical definition of hostility as non-neutral in a manner that disfavors religion is more often used by moderate and liberal justices, while—including Justice Kennedy as conservative on the topic of religious liberty—the more conservative justices have moved in the direction of a return to the ordinary language usage of "hostility" in the context of religion. One explanation is that conservatives may be more apt to perceive animus on the part of those whose actions inhibit or disfavor religion (along with being more apt to see actions as inhibiting or disfavoring religion to begin with) than liberals.

As we look at the appeals to religious hostility that the Court has made since *Lukumi*, I will seek to show how the above characterization maps onto those cases. There have been some instances where the Court has continued to appeal to "hostility to religion" as the contrast class to neutrality to religion in any way that disfavors religion.[55] But there has also been an increase in referring to hostility in a manner that would seem to equate it with animus. In some cases, this has been explicit. For example, in *City of*

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55. *See, e.g.*, Columbia Union Coll. v. Clark, 527 U.S. 1013, 1014 (1999) (Thomas, J., dissenting) ("We should take this opportunity to scrap the 'pervasively sectarian' test and reaffirm that the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion."). It seems noteworthy that in the latter case Justice Clarence Thomas saw the "neutrality not hostility" standard as a minimum; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (citation omitted) ("The message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

Boerne v. Flores, Kennedy, writing for the Court in the 1997 case, stated that "[i]t is difficult to maintain that such laws are based on animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country."[56] It is not obvious what Kennedy takes the relationship between "animosity" and "hostility" to be in his locution "animosity or hostility," but it seems to me that the best reading is that putting the two terms in conjunction helps elucidate the meaning of each by their similarity to one another and inclusion together. But the connection between hostility as being something containing enmity or animus has also more recently been expressed in subtler ways. For example, in 2000, Chief Justice William Rehnquist, writing in dissent in *Santa Fe Independent School District v. Doe* wrote of the majority opinion that it "bristles with hostility to all things religious in public life."[57] It is hard to see how that which means merely "disfavor" or "inhibition" can bristle, but that idea of bristling with animosity seems vivid and natural.

56. City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

57. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

MASTERPIECE CAKESHOP

Language is slippery and there are worse things that could happen to a Court than that it use a phrase in two diverging ways, particularly when the phrase in question isn't typically dispositive. Prior to 2018, the only clear case in which a determination of hostility to religion played the dispositive role was *Lukumi*. However, in 2018 the role of "hostility toward religion" in First Amendment jurisprudence was elevated yet again via its dispositive role in the outcome of *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* and the important role that it played in the primary dissent, in *Trump v. Hawaii*. These cases are important for several reasons. First, both cases seem to continue the shift back toward using "hostility" in its ordinary sense while still linking hostility as a counterpart to neutrality. Second, both cases apply the legal concept of hostility to religion to new kinds of cases and in new ways. As a result, these cases highlight that it is high time that the Court confront more directly the meaning of "hostility to religion" and what exactly that phrase's role in First Amendment jurisprudence ought to be.

In *Masterpiece Cakeshop*, the Court was presented with the question of whether a Colorado Court of Appeals ruling violated the First Amendment in its holding that a baker had violated the Colorado Anti-Discrimination Act (CADA) by refusing to make a wedding cake for a same-sex couple due to religious objections to same-sex marriage.[58] A Colorado Administrative Law Judge concluded that Phillips had violated CADA, which bars, among other things, discrimination based on sexual orientation in a place of public accommodation.[59] This ruling was upheld by both the Colorado Civil Rights Commission and the Colorado Court of

58. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018).

59. *Id.*

Appeals.[60] The baker, Jack Phillips, who is a devout Christian, argued that the ruling violated his constitutional rights to free exercise of religion and free speech.[61]

However, the Supreme Court did not address the questions about the free exercise and free speech rights of the baker in connection with his refusal, instead holding that the Colorado order "must be invalidated" because the Colorado Civil Rights Commission expressed "hostility" toward Phillips' religious beliefs that "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[62] This ruling is significant in terms of the role and understanding that "hostility toward religion" played in several respects.

First, like *Lukumi*, this is an outlier case when compared to previous cases both because the analysis of hostility toward religion played was dispositive and, to a lesser extent, because it was a free exercise case rather than an Establishment Clause case. However, *Masterpiece* was unlike *Lukumi* in that *Lukumi* followed the bulk of previous cases in using the analysis of hostility to religion to assess whether or not a *rule* was constitutional.[63] *Masterpiece* departed from this by applying an analysis of hostility to religion to an assessment of *adjudication*. This fact seems to have been important to Justice Ruth Bader Ginsburg, who wrote in her dissent that "[t]he different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation."[64] For Ginsburg, as we will see shortly, the way in which the hostility to religion analysis was extended in *Masterpiece* was troubling, but for Kennedy the appeal to hostility to

60. *Id.* at. 1726–27.

61. *Id.* at 1724.

62. *Id.* at 1732.

63. *See generally* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

64. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

religion in *Masterpiece* was a natural extension of what had come before.

As in *Lukumi*, Kennedy wrote the majority opinion. Kennedy explained the motivation that assessing whether the adjudicatory bodies exhibited hostility toward religion played in *Masterpiece*, writing that "the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach."[65] Seven of the nine justices concluded that the Colorado Civil Rights Commission exhibited hostility toward Phillips' religious beliefs in the sense that the Commission failed to behave neutrally toward Phillips' religious beliefs.[66]

In explaining the nature of the hostility, Kennedy offered two kinds of evidence. First, he appealed to specific claims made by two members of the seven-member Colorado Civil Rights Commission. Kennedy identified that one commissioner said that Phillips could believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state" and that the same commissioner later stated that "if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[67] He then provided a more extensive quote from a second commissioner who stated the following:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most

65. *Id.* at 1724 (majority opinion).

66. *Id.*

67. *Id.* at 1729.

> despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[68]

The second kind of evidence Kennedy offered was the fact that shortly after the Commission found Phillips liable, it concluded three other bakers *hadn't* violated CADA when they refused to make cakes which contained words and symbols that expressed religious opposition to same-sex marriage.[69] Kennedy concluded that "the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission" was "[a]nother indication of hostility."[70]

Kennedy raised a third issue based on the writings of the Colorado Court of Appeals, who reviewed *de novo* the decision of the Commission. Kennedy objected to the Court of Appeals' claim that Phillips' cake could be distinguished from the other three cases because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message."[71] Kennedy interpreted the word "offensive" here as being used in a subjective sense to refer to the adjudicators' own determination of what was offensive. (We'll return to this questionable reading of the claim later.) For now, what's relevant is that Kennedy saw this as negative treatment toward religion as well, yet framed this recognition not in terms of hostility to religion, but rather as sending "a signal of official disapproval of Phillips' religious beliefs."[72] But given the history of "disapproval" of religion also being a way of speaking about negative deviations from neutrality toward religion, if we understand hostility to religion in the semi-technical sense as a negative deviation from neutrality in

68. *Id.*

69. *Id.*

70. *Id.* at 1729–30.

71. *Id.* at 1731.

72. *Id.*

treatment of religion, this amounts to the same thing.

This leads us to the question of how we ought to best interpret what the Court meant in holding that the Commission exhibited hostility toward Phillips' religious beliefs. There is ample evidence that the Court is using "hostility to religion" as synonymous with "lack of neutrality toward religion." But there is also ample evidence to suggest that the Court is treating "hostility to religion" as synonymous with "animosity to religion." On my account, for the Court to be using hostility toward religion in both these ways is for the Court either to be equivocating or to be appealing to an incoherent concept. I'll first provide my reasons for concluding that the Court used "hostility toward religion" in both these senses (leaving aside the question of whether this leaves the Court in a position of equivocating or appealing to an incoherent concept). I'll then turn to other relevant aspects of the Court's use of hostility to religion in the *Masterpiece* case.

Perhaps the most significant indicator that the Court treated hostility toward religion as both synonymous with a lack of neutrality to religion and synonymous with animosity is the Court's expression of the holding of the case in both terms. For example, Kennedy writes that,

> For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on *hostility* to a religion or religious viewpoint. In *Church of Lukumi Babalu Aye, supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are *hostile* to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from *neutrality*" on matters of religion. *Id.,* at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner *neutral* toward and tolerant of Phillips' religious beliefs.[73]

The above passage equates hostility not only with

73. *Id.* (emphasis added).

negative deviations from neutrality, but even *subtle* such deviations. However, as Kennedy continues his explanation, again citing to *Lukumi*, he explicates hostility in terms of animosity writing that,

> The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from *animosity* to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[74]

The concept of "hostility" is pulled in different directions in the concurrences as well. For example, Justice Elena Kagan, in her concurrence connects "hostility" with "bias," while Justice Neil Gorsuch in his concurrence connects hostility with "judgmental dismissal."[75] To me, the former reads more in the vein of "hostility" as "non-neutrality" while the latter reads more in line with "hostility" as "animosity." While for a majority of the justices in *Masterpiece*, as in *Lukumi*, the distinction between non-neutrality and animosity didn't seem necessary to consider for the purposes of determining an outcome, it is not hard to envision a situation in which the distinction between these two meanings of hostility would itself be dispositive.

While much of the discussion in the last several pages has focused on an ambiguity in the Court's uses of the phrase "hostility to religion," *Masterpiece* raises a number of additional matters of importance concerning the Court's implementation of the phrase and the (perhaps incoherent) concept they mean to pick out with it. In what follows, I flag three additional points of difference between the way the Court appealed to hostility to religion in *Masterpiece* versus in previous cases. The first two points of difference are structural ones about the role that the identified hostility to religion played in generating the outcome. The third point

74. *Id.* (emphasis added).

75. *Id.* at 1733–34 (Kagan, J., concurring); *Id.* at 1734 (Gorsuch, J., concurring).

deals with a change in what counted as sufficient evidence of hostility toward religion in *Masterpiece*. Based on the discussion that follows, I conclude that 1) the Court needs to get clearer on what hostility toward religion means and 2) the Court ought to be shrinking rather than expanding the role that appeals to the phrase "hostility to religion" play in its jurisprudence.

The first structural difference in *Masterpiece* is that, unlike previous cases, it is not clear that hostility to religion was a "but for cause" in the issue at hand, so to speak. By this I mean the following. In Establishment Clause cases in which laws are assessed to determine if they hostile to religion, generally the issue in those cases is whether the law would be in place *but for* hostility (typically cast as non-neutrality) to religion. Similarly, in *Lukumi* one way to frame what the Court asked was whether the Hialeah ordinance against the slaughter of animals would have been in place *but for* hostility against the Santeria. However, in *Masterpiece*, the Court does not appear to have been concerned with whether Colorado would have ruled as they did *but for* the supposed hostility.

This is evidenced in *Masterpiece* by the fact that at no point did the Court question the neutrality of the Administrative Law Judge who first determined that Phillips had violated CADA. And even when it came to the Commission, Kennedy's opinion never suggested, *contra Lukumi*, that were it not for the hostility toward religion exhibited on by the Commission, that the ruling would have been reversed. Rather, the Court's view seems to be the weaker position that the perceived lack of neutrality undermines confidence that Phillips was treated fairly. One of Ginsburg's primary points in her dissent seems to be that potential lack of neutrality wasn't enough to warrant invalidating the Colorado Court of Appeals decision, especially when there were other levels of independent decision-making. Ginsburg lays out this objection as follows.

> I see no reason why the comments of one or two Commissioners

> should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council.[76]

This expansion of what type of procedure is assessed for hostility toward religion is a second structural way in which *Masterpiece* represents an expansive change in the role that appeals to hostility to religion in Supreme Court freedom of religion jurisprudence. In one respect, this expansion doesn't strike me as problematic. Preserving neutrality along with an appearance of neutrality toward religion in adjudications is important, and it makes sense for the Court to examine such things in seeking to uphold the First Amendment.

But someone might reasonably find troubling the way in which the Court downplayed the extent to which *Masterpiece* represented new territory in First Amendment jurisprudence. The framework created in *Lukumi* was used to assess the constitutionality of *ordinances* and the process by which they were *passed*. In *Masterpiece*, the Court extended the *Lukumi* framework to look at the constitutionality of a multi-level adjudicatory process, but never identified this as an extension of the doctrine. In so doing the Court breezed over the salient ways in which the two processes under examination differed. As Rutgers Law Professor Bernard Bell points out, "Jack Phillips' lawyer herself did not object to any of the three 'offending' statements during the proceeding and never sought any Commissioner's recusal. That failure to exhaust

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76. *Id.* at 1751–52 (Ginsburg, J., dissenting) (internal citations omitted).

administrative remedies would ordinarily preclude challenging the Commission's ruling on the grounds of Commissioner bias."[77] Bell also notes that "Masterpiece Cakeshop asserted a claim of bias for the first time in its briefs to the Colorado Court of Appeals" and even at that point identified only one of the comments considered in the Supreme Court's opinion.[78] Bell points out that if a recusal motion had been made the Commissioners "would have had an opportunity to explain their determination on recusal or provide context for their statements."[79]

Regardless of whether the Court should have denied certiorari given the earlier steps Phillips' lawyers failed to take and the other administrative remedies that hadn't been pursued, the point is that the Court's ruling in *Masterpiece* fails to put forward any kind of developed view on when and how the possibility of hostility to neutrality within a multi-level judicial proceeding ought to impact the rulings generated. The default rule as of now seems to be, find hostility at any level and regardless of what steps may or may not have been taken to address the hostility at earlier levels, once the hostility is identified, and the ruling ought to be invalidated. This seems to put too few expectations on parties to raise claims of potential bias or hostility in adjudicatory proceedings as they arise. And given the difficulty of predicting what an appeals court may consider an instance of hostility or bias, this puts trial, and mid-level courts of review in a difficult position.

Thus, structurally, *Masterpiece* expanded the role that

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77. Bernard Bell, *A Lemon Cake: Ascribing Religious Motivation in Administrative Adjudications—A Comment on Masterpiece Cakeshop (Part II).* YALE J. ON REG. (June 20, 2018), http://www.yalejreg.com/nc/a-lemon-cake-ascribing-religious-motivation-in-administrative-adjudications-a-comment-on-masterpiece-cakeshop-part-ii/.s

78. *Id.* (citing Appellants' Opening Brief at 26, Craig v. Masterpiece Cakeshop, 370 P.3d 272 (2015), accessible at, 2015 WL 13622550; Appellants' Reply Brief at 14–15, accessible at, 2015 WL 13622552).

79. *Id.*

appeals to hostility to religion play in free exercise jurisprudence 1) by treating a finding of hostility to religion as dispositive even without an argument that the hostility played a but for cause in the outcome, and 2) by applying the test of hostility toward religion to a multi-level adjudication. But *Masterpiece* is also significant because, like *Lukumi*, it provides us with another instance where the Court concentrates on what counts as evidence of hostility toward religion. However, in *Lukumi* the only reasonable interpretation of the evidence was that Hialeah had exhibited hostility toward the Santeria religion. By contrast, in *Masterpiece* the evidence Kennedy cites of hostility toward the baker's religious beliefs is open to multiple interpretations. And only by adopting an uncharitable reading of the Colorado Civil Rights Commission can we make sense of the claim that the Commission displayed "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." This highlights the slipperiness of the hostility toward religion test and provides additional reason to rethink its place in the Court's First Amendment jurisprudence.

In order to see how what was presented as evidence of the Commission's hostility toward the baker's religious belief is open to multiple reasonable interpretations, we need to look more closely at the evidence Kennedy offered of hostility to religion. Kennedy offered the statements of two members of the seven-member Commission and information about three other rulings made by the Commission as his evidence. Let's look at each in turn.

First, Kennedy provides two claims made by Commissioner Raju Jairam.[80] Kennedy writes that Jairam "suggested that Phillips can believe 'what he wants to

80. Portions of this section were previously included in Mark Satta, *Masterpiece Cakeshop: A Hostile Interpretation of the Colorado Civil Rights Commission*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV.: Amicus (Apr. 12, 2019) https://harvardcrcl.org/masterpiece-cakeshop-a-hostile-interpretation-of-the-colorado-civil-rights-commission/.

believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'"[81] Kennedy also cites Jairam's claim that "if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[82] Kennedy acknowledges that these statements are ambiguous, writing that,

> Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.[83]

It's unclear whether "the comments that followed" that Kennedy refers to are the comments that follow in Kennedy's majority opinion or the comments that followed in the original Commission hearing that Kennedy is quoting from. Because Kennedy is unclear on this point, let's consider both interpretations.

In looking at the context surrounding Jairam's statements in the record for the Commission's hearing, it's hard to see how the context of the Commission hearing could lend credence to Kennedy's interpretation that Jairam's remarks were "inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced." At the hearing leading up to the first comment Kennedy cites from Jairam, another one of the Commissioners, Diann Rice, was offering her reasoning for thinking that the law under which charges against the baker were brought was a constitutional law. The transcript from the hearing quotes Rice as saying the following:

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81. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

82. *Id.*

83. *Id.*

> I think that the Colorado Antidiscrimination Act is written in a very neutral manner. Some exceptions have been made for religious organizations or businesses or organizations that clearly serve a single sex. As noted a women's clinic or some organization like that. But those are very clear—clearly delineated exceptions. If Masterpiece Cakeshop were—or Mr. Phillips were an ordained minister and he was only serving commissioners or congregates of his church that might be a different situation. But he is—does have a public business and is serving the public. So I—you know, I don't think that this case falls within the exceptions . . . I think there is a very significant and important reason for the Antidiscrimination Act and a significant—it is a significant benefit to the state to have this statute and to enforce it.[84]

After Rice concluded, the Commission Chair, Katina Banks, acknowledged Rice's comments, agreed with them, and asked "does anyone else have anything they want to add?" It is at this point that Jairam spoke. The meeting transcript records a back and forth between Jairam and Banks as follows.

> Commissioner Jairam: I don't think the act necessarily prevents Mr. Phillips from believing what he wants to believe. And—but if he decided to do business in the state, he's got to follow (inaudible). And I don't think the Act is overreaching to the extent that it prevents him from exercising his free speech.
>
> Chairwoman: Well, free speech we already—we talked about. But what do you think about his—
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> Commissioner Jairam: His belief system, yes.
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> Chairwoman: Right, right, his religious beliefs.
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> Commissioner Jairam: We all have our own belief systems.
>
> Chairwoman: Yes.
>
> Commissioner Jairam: And, you know, as a businessman, I shouldn't allow my belief system to impact how I treat people, bottom line.
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> Chairwoman: Okay. That is the bottom line, Commissioner Jairam, thank you . . . To make sure I'm understanding, we're saying that we think the statute—there are good reasons for the statute; that it

84. Transcript of Colorado Civil Rights Commission Meeting, Craig v. Masterpiece Cakeshop, 22–23 (May 30, 2014).

> is valid; and that it's neutral in general in its application simply—just as the administrative law judge determined.[85]

Several things are illuminated by this additional context. First, the Commission clearly has as one of its values that Colorado law be neutral toward religion (as evidenced by the comments of Rice and Banks). Second, the Commission offered a cogent rationale for concluding that the law in question was neutral toward religion. Third, Jairam seemed to be making an important and long-held distinction in United States First Amendment jurisprudence—namely, that the right to religious belief is absolute, but that the right to religious action is not.[86] Jairam's point seems to be one about the ability of the state to impose reasonable and neutral restrictions on actions, even while the right to belief remains absolute. Fourth, the conversation is one that is blending together questions about free speech with questions about free exercise of religion. In this light, it takes a very uncharitable reading of Jairam to attribute to him the views that Kennedy does.

Adding context to Jairam's second quote even more strongly undercuts the interpretation Kennedy gives to Jairam's statements. In the second quote, Jairam was responding to "an argument by the respondent" that "he didn't offer to sell them a wedding cake, but he offered to sell them different products."[87] In expressing why he didn't find that argument compelling, Jairam is recorded as stating the following.

> And I believe the—it was best said by the judges in the New Mexico case, where the laws are here just to protect individuals from humiliation and dignitary harm. And that they should be very clear, that is, we do not want people to feel undignified when they walk into any place of business and do business that, you know, serves

85. *Id.*

86. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

87. Transcript of Colorado Civil Rights Commission Meeting, Craig v. Masterpiece Cakeshop, 22–23 (May 30, 2014).

> the public.
>
> And I will also, you know, refer—you know, I'm referring to the comments made by Justice (inaudible) in that case. And essentially he was saying that if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise. And I think it was very well said by that judge.[88]

The added context presents the reader with the significant detail Kennedy omits that Jairam was offering a paraphrase of a New Mexico judge, not his own view. Once again it seems to me most plausible that Jairam's underlying point is about the difference between the absolute right to believe and the more limited right to action, especially when acting as a proprietor in the public sphere. So when it comes to the comments of Commissioner Jairam, not only does the conclusion that Jairam made "inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights" seem uncharitable; it is implausible full-stop.

But as stated earlier, Kennedy writes ambiguously about whether it is the context of the Commission hearing or the subsequent portion of his opinion that is supposed to make it clearer that Jairam's comments exhibited hostility to religion. Having discussed Jairam's statements, I turn to the subsequent portion of Kennedy's opinion. After offering Jairam's comments as evidence of hostility toward the baker's religious beliefs, Kennedy cites a statement from a second commissioner at a later hearing. The transcript containing this comment attributes the statement to a "female speaker" who, based on the context of the conversation, appears to be another commissioner. The speaker is recorded as saying the following.

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—

88. *Id.*

> we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[89]

In discussing this quote Kennedy writes that,

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.[90]

At first blush, this Commissioner's comments seem more plausible than Jairam's comments as showing hostility toward the baker's religious belief. But context once again complicates things, as does a careful look at what the Commissioner actually said.

First, the context in which this quote is presented provides much less of a guide as to what the Commissioner might have meant. The statement was offered very near the closing of the meeting when the Chair was asking each member if they had any closing comments they wanted to offer before a final motion. The quoted Commissioner was the last to offer a comment at a point in which the conversation seemed already to have mostly wrapped up and in which it's not clear how her comment connected to the comments that preceded hers. Kennedy takes as evidence of hostility toward the baker's religion the fact that "[t]he record shows no objection to these comments from other commissioners."[91]

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89. *Id.*

90. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).

91. Transcript of Colorado Civil Rights Commission Meeting, Craig v. Masterpiece Cakeshop, 22–23 (May 30, 2014).

But it's not clear what service responding to the comment would have served given that it doesn't appear to have been material to the rest of the discussion at the hearing or to the outcome of any motions. Rather, it seemed merely to have been offered at a time in which the Chair was allowing each member to say their final words.

Second, while it may be reasonable of Kennedy to assume that the Commissioner's comment was about the baker's belief, the Commissioner never actually references the baker in her comments at all. Rather, all the Commissioner states are some historical claims followed by an opinion that it's despicable rhetoric to use religion to hurt people. But, given the comment's acontextual nature, the Commissioner could just as easily be commenting about the possibility that the baker was feigning sincerely held belief in order to legally justify his discrimination. The Commissioner's comment is mysterious. It's an expression of sentiment, but it's not clear how the sentiment was meant to map onto the case at hand or onto the baker's beliefs.

The takeaway from Jairam's comments and the second Commissioner's comments are different and it is worth noting those differences. In the case of Jairam, only on an uncharitable reading can he be viewed as having displayed hostility toward the baker's religious beliefs. In the case of the second Commissioner, that she exhibited hostility toward Phillips' religion seems like a viable possibility, but if we look at what she actually said and at the context in which she said it, it is not obvious that this is so. At the very least it is not obvious in the way that a city attorney stating that "This community will not tolerate religious practices which are abhorrent to its citizens . . ." indicates hostility toward the Santeria religion when offered in the context of whether or not to pass a law banning the ritual slaughter of animals right after the Santeria obtained the proper licensing for a church in the city of Hialeah.

The third piece of evidence that Kennedy offered was the fact that the Commission had ruled that three other bakers

hadn't violated Colorado law, which protects customers on the grounds of religious creed as well as sexual orientation, when those bakers turned down requests to make cakes containing messages expressing religious opposition to same-sex marriage. Kennedy writes that "[t]he treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished."[92] I agree that this is one (among several) reasonable interpretations. But a "reasonable interpretation" standard seems to me entirely the wrong standard to adopt. Implicit in the claim that a "reasonable interpretation" of this fact was that there was inconsistency is that there are other reasonable interpretations in which there was not inconsistency. And it seems to me there are such reasonable interpretations, and that these other reasonable interpretations are far more plausible interpretations.

For example, the cakes in the other three cases all involved specific text and symbols on the cakes that the bakers refused to apply. Thus, another reasonable interpretation is that the Commission treated the other three cases differently because they all involved explicit messaging, while the cake in *Masterpiece* arguably did not. The Supreme Court could choose ultimately to disagree that such a difference *should* matter, but that doesn't change the fact that the Commission could have used that difference between the cases in good faith as a principled reason to reach different conclusions among the cases. Furthermore, if one is being charitable to the Colorado Court of Appeals, it seems more likely to me that when the Court of Appeals wrote that Phillips' case could be distinguished from the other three cases because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message," their point

92. *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

wasn't that messages opposing same-sex marriage were offensive *to them* and that messages in support of same-sex marriage were not offensive to them. Rather, what they meant to highlight was that by asking for cakes with specific text and symbols, the customer in the other three cases was asking for them to make a much more explicit message that *the bakers* found offensive. The key to the distinction was the nature of the message the cakes contained, not who found the message offensive. So it would seem that at best all Kennedy offered was that bias on the part of the Commission against Phillip's religious beliefs was but one of several reasonable interpretations of the evidence presented.[93]

If the Court is going to invalidate a ruling on grounds of hostility to religion, it seems that the Court's standard ought to be much higher than merely that a reasonable interpretation of a lower adjudicative body's actions is that the actions indicate hostility toward religion. The Court's framework seems to me to be a troublesome deviation from the standard in *Lukumi* where Kennedy wrote that "the neutrality inquiry leads to *one* conclusion: The ordinances had as their object the suppression of religion."[94]

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93. *See* Mark Satta, *Why You Can't Sell Your Cake and Control it Too: Distinguishing Use from Design in Masterpiece Cakeshop v. Colorado*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV: AMICUS (July 10, 2019) https://harvardcrcl.org/why-you-cant-sell-your-cake-and-control-it-too-distinguishing-use-from-design-in-masterpiece-cakeshop-v-colorado/ (arguing at greater length that there are principled and legally relevant distinctions between Phillips' case and the cases of the three other bakers).

94. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (emphasis added).

TRUMP V. HAWAII

Masterpiece wasn't the only high-profile case in 2018 to engage with the Court's jurisprudence around hostility to religion. Weeks after the decision in *Masterpiece*, in *Trump v. Hawaii* the Court ruled 5-4 that President Donald Trump's ban on entry into the United States of foreign nationals from seven countries, most of which were countries with Muslim majority populations, was a permissible exercise of presidential power. Chief Justice John Roberts, who wrote the opinion for the Court, referenced hostility to religion in two places, both of which seem to be responses to the dissents offered by Justice Stephen Breyer and Justice Sonia Sotomayor. In his first reference, Roberts writes the following.

> It cannot be said that it is impossible to "discern [from Trump's travel ban] a relationship to legitimate state interests" or that the [Trump's] policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.[95]

Shortly thereafter, Roberts also writes that,

> The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.[96]

Roberts appears to be aiming to accomplish two different things here. In the first quote, Roberts offers a reason for why

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95. Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018).

96. *Id.*

an examination of the question of hostility to religion is the wrong test to apply in this case. In the second quote, Roberts presents an argument for why hostility to religion cannot be inferred in the case of the proclamation in question.

There are a number of important points worth highlighting here. First, note that in the first of the two quotes provided from Roberts, the Chief Justice appears to be using the terms "animus" and "hostility" interchangeably. We will see that Sotomayor does the same in her dissent. Thus, the current Court seems very comfortable treating "hostility to religion" as synonymous with "animus to religion."

Second, Roberts' argument that an examination of potential hostility toward the Muslim religion on the part of Trump is unnecessary strikes me as jurisprudentially mysterious. Roberts' view seems to be that because rational basis is the proper test for determining if there is presidential authority to make the proclamation that somehow this entails that the question of whether or not there was hostility to religion becomes moot. This is mysterious because, as we have seen throughout this paper, traditionally assessments of whether or not there is hostility to religion—whether that is understood as a lack of neutrality, as animus, or as both—are ways of testing whether or not a constitutional violation of the First Amendment right to religious freedom has occurred. In *Hawaii*, the Court determined that three individual plaintiffs had standing because of the exclusion of their relatives.[97] Even if, barring hostility to religion, a president has the authority to issue a ban on entry into the United States of the sort under question here, it seems that a separate question remains over whether the constitutional rights of the plaintiffs were violated if the motivation for the passage of the law was unconstitutional hostility against the religion of the plaintiffs and/or the plaintiffs' relatives.

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97. *Id.* at 2416.

Third, in looking at Roberts' second quote, the single piece of data he dismisses (the fact that "[p]laintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations") is portrayed in a manner implying that this was the only or primary piece of evidence put forward by the dissent that there was hostility to religion, but this radically underdetermines the evidence put forward by Breyer and especially the evidence put forward by Sotomayor, both of whom outline multiple reasons for concluding that the ban on entry was motivated by hostility toward religion.

Fourth, in his second quote Roberts seems to be arguing merely that on its face the proclamation appears neutral to religion. But this seems to run counter to the principle put forward by Kennedy in *Lukumi* that "the Free Exercise Clause protects against governmental hostility which is masked as well as overt."[98] While Roberts doesn't cite to *Lukumi* at all, it is one of the first citations in both Breyer and Sotomayor's dissents and provides an important part of why both Sotomayor and Breyer frame the case very differently than Roberts.

Citing *Lukumi* and *Masterpiece*, Breyer frames the heart of the issue in his dissent as follows: "If its [the ban's] promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself."[99] Breyer's dissent then consists of looking at different potential sources of evidence for the claim that there was religious animus against Muslims. Breyer concludes his dissent with a two-tiered conclusion. First, Breyer concludes as follows.

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98. *Lukumi,* 508 U.S. at 534. Given that this was Kennedy's test, it also strikes me as jurisprudentially mysterious that Kennedy signed on to Roberts' opinion. I say "jurisprudentially" mysterious, because sadly the matter is less politically mysterious, although just as troubling.

99. *Hawaii,* 138 S. Ct. at 2429 (Breyer, J., dissenting).

> Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated.[100]

However, Breyer also stakes a claim on how he would rule should the Court have needed to decide the animus question at that time writing that,

> If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside.[101]

Breyer's dissent is important for several reasons. First, at no point does Breyer reference "hostility." Rather, he uses phrases like "animus against religion" and "antireligious bias" in a manner that seem to be treated as synonymous with "hostility toward religion." Second, while acknowledging that there is evidence of religious bias, his first choice of action was to let the lower court make a finding of fact concerning whether there was in fact bias present. Yet he was comfortable ruling on the question of bias in the *Masterpiece* case, where the same deference to letting a lower court sort out the issue of fact could have been offered. It is unclear whether Breyer saw *Hawaii* as relevantly different from *Masterpiece*, or if Breyer's view in *Hawaii* is indicative of a shift away from his position in *Masterpiece*.

The most extensive discussion of hostility toward religion in *Hawaii* occurs in Justice Sotomayor's dissent. As

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100. *Id.* at 2433.

101. *Id.*

in Roberts' opinion and Breyer's dissent, Sotomayor links hostility to religion with both non-neutrality toward religion and animus toward religion. For example, in her opening paragraph she writes both that "[o]ur Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment" and that "[b]ased on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim."[102]

While Roberts ignored *Masterpiece* and Breyer seemed to deviate from his position in *Masterpiece* despite his referencing the case, Sotomayor called out the stark difference in treatment that claims of hostility toward religion received in the *Masterpiece* majority compared to the *Hawaii* majority, which was comprised of a subset of the *Masterpiece* majority. Sotomayor admonishes the Court for the quick change in perspective in the following paragraph.

> Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country that "they are outsiders, not full members of the

102. *Id.* (Sotomayor, J., dissenting).

political community."[103]

Sotomayor highlights a troublesome slipperiness that seems to have invaded (or perhaps has always been present) in the Court's appeals to hostility toward religion. It strikes me as worrisome that seven of the nine justices flipped sides on what they considered a sufficient expression of hostility to religion along partisan lines, and that even the two justices who saw hostility as present in both cases, Breyer and Kagan, suggested a different procedure for how that hostility ought to be handled in the two cases. In Sotomayor's case, her switch in position alongside Ginsburg can be explained both by an appeal to the precedent her colleagues set down in *Masterpiece* and her view that the hostility in *Hawaii* was more severe. However, it is harder to explain the change in view of the five justice who remained in the majority for both decisions.

103. *Id.* at 2435 (internal citations omitted).

AMERICAN LEGION

The Court's most recent appeal to hostility toward religion occurred on June 20, 2019 when the Court delivered its opinion in *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2018). In *American Legion*, the Court held that the presence of a ninety-year-old World War I memorial in the form of a 32-foot Latin cross on public land in Maryland does not violate the constitutional prohibition against governmental establishment of religion.[104] The concept of hostility to religion does not taken center stage in this case like it did in *Masterpiece* or in Sotomayor's dissent in *Hawaii*. However, the role that the concept of hostility toward religion plays in this case puts on prime display the harmful way in which the ambiguity over the meaning of hostility to religion has left the concept overly malleable and ripe for cooption for partisan ends.

Justice Samuel Alito wrote the opinion for the Court in *American Legion.* Alito's opinion relies heavily on the idea found in the Court's precedent that symbols with religious origins can nevertheless gain additional secular meanings and purposes over time in the right contexts.[105] The bulk of Alito's opinion is devoted to supporting two conclusions. First, Alito argues that the *Lemon* test for assessing whether an action violates the Establishment Clause ought not apply in cases like *American Legion*.[106] Second, Alito argues that the cross in *American Legion* represents one of those instances where a symbol with a religious origin took on a secular meaning of historical importance.[107] On these grounds, Alito concludes that the presence of the cross on public land is "fully consistent" with the aim of the "Religion

104. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2018).

105. *Id.* at 2082–83 (citing Van Orden v. Perry, 545 U. S. 677, 688–90 (2005) and McCreary Cty. v. ACLU of Ky., 545 U. S. 844, 845 (2005)).

106. *Id.* at 2080–87 (discussing the applicability of Lemon v. Kurtzman, 403 U.S. 602 (1971) to the issue at hand).

107. *See id.* at 2085–87, 2089.

Clauses of the Constitution."[108]

Alito not only makes the case that keeping the cross up and intact is consistent with the First Amendment. He also implies that removing the cross would be inconsistent with the First Amendment because the removal of the cross "would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions."[109] It is in making this latter point that Alito relies on the concept of hostility to religion. As we will see, he is clearly using "hostility towards religion" as "non-neutral toward religion." However, given his interest in the appearances of hostility and neutrality by the American people, he also doesn't seem to be using the phrase "hostility to religion" in a technical sense.

To see more clearly what I mean, it will be useful to have before us Alito's references to "neutrality" and "hostility" in his opinion. Alito first mentions both neutrality and hostility in the introductory paragraphs of his opinion stating that "removal or radical alteration [of the cross] at this date would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions."[110] This is noteworthy for the aforementioned reason that it contrasts hostility to neutrality. But it is also significant because it is ultimately not a statement about what is neutral or hostile to religion but about what "would be seen by many" as non-neutral and hostile. It is a claim about appearances and perception. (Perhaps those perceptions track reality, but it is reasonable to think that acceptance of this connection ought to be argued for.)

This focus on *appearance* of non-neutrality and hostility remain the focus of Alito's references of the topic. And Alito's

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108. *Id.* at 2074.

109. *Id.* (internal quotation marks removed) (citing *Van Orden*, 545 U.S. at 704).

110. *Id.*

points often are speculative claims about what *may* be viewed as non-neutral to *partial* portions of the population.

For example, Alito next references neutrality stating that "when time's passage imbues a religiously expressive monument, symbol, or practice with . . . familiarity and historical significance, removing it *may* no longer *appear* neutral."[111] He once again follows this up with a connection to hostility, writing that a "government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will *strike many* as aggressively hostile to religion."[112]

Alito does not reference hostility again directly, but he does make two more references to neutrality. He next references neutrality, writing that "as World War I monuments have endured through the years and become a familiar part of the physical and cultural landscape, requiring their removal would not be *viewed* by *many* as a neutral act."[113] And in closing his opinion Alito writes the following.

> For *many* of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.[114]

It is only here at the very end of his opinion that Alito closes the gap between the possibility that removal of the cross would appear non-neutral to a portion of the population, to his conclusion that the presence of the cross does not offend the Constitution.

Alito's opinion in *American Legion* is instructive of two problematic aspects around the Court's appeals to hostility

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111. *Id.* at 2084 (emphasis added).

112. *Id.* (emphasis added).

113. *Id.* at 2086 (emphasis added).

114. *Id.* at 2090.

toward religion in constitutional cases. First, it continues the unacknowledged and increasingly frenetic swing between the Court's usage of hostility as akin to animosity, as found in Kennedy's *Masterpiece* opinion and Sotomayor's *Hawaii* dissent and hostility as akin to mere non-neutrality, as was the case in Alito's *American Legion* opinion.

Second, Alito's opinion showcases the role that ideological and partisan bias can play in assessments of neutrality or hostility to religion. Alito is diligent in assessing what may appear non-neutral or hostile to religion among those portions of the population that want the cross left up, but he never acknowledges the obvious fact that there are also Americans who clearly find the presence of the cross non-neutral to religion. This perception of non-neutrality is at the heart of what motivated the lawsuit by the American Humanist Association to begin with. Alito has implicitly adopted the principle that perceptions of an action being non-neutral to religion are a reason to view it as non-neutral to religion.

However, such a principle will consistently lead to inconsistent results whenever one portion of the population views an action as non-neutral to religion while another portion of the population views failure to do that action as non-neutral to religion. In the case at hand, this inconsistency went overlooked because Alito focused only on what might appear non-neutral to those in favor of the cross staying up: a portion of the population that is likely disproportionately comprised by individuals who adhere to the United States' majority religion, Christianity, and as a result likely disproportionately excludes members of minority religions and the non-religious. When the perspectives of some are attended to in a way that the perspectives of others are not, and when such attention correlates with religious belief, this bakes non-neutrality right into the assessment of Establishment Clause violations.

REFORMS GOING FORWARD

Having covered a thorough presentation of the history of the Court's appeals to hostility to religion in First Amendment jurisprudence, it is time to take stock of what we've seen and to provide some recommendations for the way forward. Given the significant role that the concept of hostility of religion played in three high profile cases in the last two years alone, it is high time that more scrutiny be given as to how the Court has employed the concept and what it ought to do moving forward.

In this closing section, I offer four suggestions dealing with how the Supreme Court should refine its jurisprudence concerning appeals to hostility toward religion. These suggestions are based on what's been discovered in this paper about the Court's practices heretofore. Part of my motivation for suggesting these modifications is that the Court's appeals to hostility to religion have run parallel to discussions about hostility to religion in the larger political arena. As the language of the Court and summaries of the Court's opinions get disseminated into the wider culture, the quasi-technical sense of "hostility to religion" as any form of non-neutrality to religion is apt to be lost, and the strong and vigorous war-like connotations of the term "hostility" are apt to take center stage. What is lost in translation between Court opinions and the wider culture runs the risk of stoking the culture wars and contributing to public misunderstanding of difficult jurisprudential issues.

A thorough examination of appeals to "hostility to religion" in the public square would require far more space than would be prudent to include in this Article. However, before getting to my proposed modifications to the Court's jurisprudence, I want to offer two anecdotes of the phenomenon of appeals to hostility to religion being disseminated into the broader cultural conversation around the relationship between religion and state.

First, in 1984, when President Ronald Reagan was

advocating passage of a constitutional amendment that would allow organized prayer in public schools, the *Los Angeles Times* reported on the story with the headline "Reagan Pushes School Prayer: Says Government Must End Hostility to Religion." The opening line of the article reads as follows. "Declaring that government must change its 'hostility to religion,' President Reagan said Tuesday that a constitutional amendment allowing organized vocal prayer in public schools 'would do more than any other action to reassert the faith and values that made America great.'"[115]

Figuring out whether prominent culture references to "hostility to religion" predate the Court's uses of the phrase or if it's the other way around is a sort of chicken and egg question that for the purposes of this paper doesn't need to be answered. But the point here is that Reagan couched his call for action specifically as a response to "hostility to religion." In this wider cultural conversation around the proper relationship between church and state where the audience doesn't have the same nuanced exposure to how the phrase has been used in Supreme Court jurisprudence, such audiences are apt to take judicial rulings declaring "hostility to religion" at face value using the ordinary meaning of the phrase. Thus, the Court has the power—even if at points it is wielding the power unwittingly—to stoke or dampen the culture wars over what it identifies as hostility to religion by legitimatizing and sanctioning viewing certain acts as exhibiting "hostility to religion."

The second anecdote shows even more clearly the difficulties that the mismatch between the Court's quasi-technical definition of "hostility to religion" and the more ordinary meaning of that phrase can cause for those speaking about legal issues about church and state in the public square. At the end of the Court's 1996–1997 term, Harvard Professor Mary Ann Glendon wrote an op-ed in the

115. George Skelton, *Reagan Pushes School Prayer: Says Government Must End Hostility to Religion*, L.A. TIMES, (Mar. 7, 1984).

New York Times discussing two of the Court's end of year rulings dealing with the Establishment Clause. In her op-ed Professor Glendon, who believes the First Amendment's protection of freedom of religion is best viewed as a single provision, wrote that "[i]n the 1940's, several Justices, with ill-disguised hostility to religion, set the two 'clauses' of the First Amendment in opposition to each other."[116] In response, New York University Law Professor, Nadine Strossen, who was at the time the President of the American Civil Liberties Union, wrote a letter to the editor arguing that "Mary Ann Glendon perpetuates a widespread myth as dangerous as it is false when she equates vigorous enforcement of the Establishment Clause with 'hostility to religion' . . . . In the words of former Supreme Court Justice Harry Blackmun, 'nothing could be further from the truth' than to 'misperceive a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion.'"[117]

It seems to me quite likely that Glendon and Strossen were expressing a genuine difference of opinion that attentiveness as to the proper meaning of "hostility to religion" on its own would not have solved. Yet, the Court's disparate treatment of what it means by "hostility to religion" adds fuels to the disagreement and obscures the meaning of their claims. After all, Strossen explicitly appeals to the Court's precedent in her response, and Glendon, who is a leading scholar in Constitutional freedom of religion, no doubt has had her understanding of what constitutes hostility toward religion shaped by the Court's precedent. But all this is likely lost for most *New York Times* readers who will be tapping into only the common connotations of the

116. Mary Ann Glendon, *Religious Freedom and Common Sense*, N.Y. TIMES (June 30, 1997), https://www.nytimes.com/1997/06/30/opinion/religious-freedom-and-common-sense.html.

117. Nadine Strossen, *Religious Hostility Myth*, N.Y. TIMES (July 4, 1997), https://www.nytimes.com/1997/07/04/opinion/l-religious-hostility-myth-967777.html.

word "hostility" in interpreting the exchange between Strossen and Glendon.

The suggestions that follow thus aim at improving the Court's jurisprudence on two levels. First, the suggestions are meant to help make the Court's First Amendment jurisprudence clearer and more coherent. Second, the suggestions are meant to help improve the expressive value and expressive effectiveness of the Court's decisions about religious freedom to the wider public.[118] The suggestions are as follows.

First, the Court should begin adopting language that acknowledges the distinction between all that which is non-neutral to religion versus that which actively exhibits animosity toward religion. Using "hostility to religion" as a contrast class to "neutrality toward religion" (or in the case of Burger and Kennedy as a contrast class for that which doesn't "accommodate religion") is a historical accident that we don't have any good reason to continue. Rather, the Court can make its points clearer by using other language it has historically appealed to in pointing out that something fails to be neutral to religion. For example, justices can continue to speak of that which disfavors or inhibits religion. From the perspective of choosing language that best represents the point, to say that the law ought to be neutral to religion is better served by pointing out that laws should neither favor nor disfavor religion or should neither advance nor inhibit religion. There is no need to appeal to hostility to religion when simply trying to make the point that a law which disfavors or inhibits religion fails to be neutral to religion. The reason for this is that when the point is that religion is merely disfavored or inhibited by a law, what one needs to convey is that religion is harmed by the law. The key point is about the *consequences* to religion; not about the attitudes or

118. In defense of the expressive value of law, see, for example, RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

aims of lawmakers or judges. When harmful consequences to religion are the focus, using less loaded language like disfavoring or inhibiting religion can make that clearer.

On the other hand, there are indeed instances in which it is appropriate to call out active hostility against religion as in *Lukumi.* In such cases, presumably the point the Court is trying to make is one not just about consequences for religion, but also about the attitude of the lawmakers or law enforcers. In such a case the language of hostility is more appropriate. However, even here if one wanted to avoid getting entangled in the messy history of appeals to hostility to religion by the Court, a lawyer or justice can use the language such as "animosity" or "ill-will" instead of "hostility." Creating this linguistic bifurcation between two concepts, both of which are currently picked out by the phrase "hostility to religion," would allow the Court to issue clearer opinions.

Second, because "hostility" in its ordinary sense has implications for the internal thoughts and attitudes of the subject who is hostile, the Court would benefit from being more cautious in attributing the attitude of hostility to others when the evidence is indeterminate or ambiguous. The *Masterpiece* case is a good example. Despite acknowledging the underdetermination of the evidence, because Kennedy viewed it as reasonable to interpret the evidence as a manifestation of hostility on the part of the Colorado Civil Rights Commission, he imputed hostility to them. From the vantage point of the ordinary use of the phrase, accusing a lawmaker or adjudicator in a liberal democracy of being hostile to religion is a weighty charge. It is an accusation that should be levied judiciously. And it seems to me that when hostility toward religion is but one reasonable interpretation of the evidence, that levying an accusation of hostility toward religion is imprudent. If the Court's point in *Masterpiece* was that the adjudication process was infiltrated with a lack of guarantee of objectivity, there are ways to make this point without attributing hostile bias to the parties in question.

Alternatively, if the point was that there may have been bias in the process based on appearances, a more fitting remedy would seem to be remanding rather than simply "invalidating" without further guidance or instruction.

Third, because of the ambiguity present in the Court's appeals to hostility to religion, it is unclear what exactly the principle laid out in *Lukumi* and further applied in *Masterpiece* is. What precisely did the Court mean when it held that "the Free Exercise Clause protects against governmental hostility which is masked as well as overt"? Is this merely a tautological principle that cases like *Lukumi* aren't *Smith*-style cases because the relevant laws are not neutral laws of general applicability and therefore hostile to religion in the sense of "hostile" as "non-neutral"? Or was the Court saying something more specific about how laws that are neutral in application can still be found unconstitutional if animosity toward religion motivated their passage? As of right now, it's not clear what the answer to this question is, but the outcome of a future case could easily hang on this distinction. If the Court clarifies what it means by "hostility to religion" this can help sort out ambiguities involving hostility to religion in the Court's developing First Amendment jurisprudence.

Fourth, if the Court is going to take into consideration perceptions of hostility to religion as a salient factor in determining what does and does not violate the Establishment Clause, as the Court did in *American Legion*, then the Court needs to be careful that it not only focus on the perceptions of some portions of the population. If it matters that some Christians will find taking down a cross on public land to be hostile to their faith, it should matter just as much that some Jews (and some other Christians for that matter) will find keeping the cross up on public land hostile to their faith or other faiths. The Court can't pick and choose whose perceptions of hostility matter.

In this paper, I've aimed to show how the development of appeals to "hostility to religion" on the Supreme Court has

contained much that is a product of chance and a lack of careful definition. Given what the doctrine has grown into, it is high time that the Court be more intentional in how it makes these appeals. The suggestions I offered in this final section provide a way to make that start.

CONCLUSION

The recent trends exhibited in *Masterpiece*, *Hawaii*, and *American Legion* suggest that the concept of hostility to religion is waxing, not waning, in influence. And as the significant public interest generated by these cases shows, how the Court expresses its views in cases like these can have an impact on how the relationship between church and states is perceived on a broader cultural level. Heretofore, the Court has not offered an explanation as to what constitutes hostility to religion in its jurisprudence, and in the absence of that explanation, problematic and ambiguous uses of the term have arisen. This ambiguity and inconsistency has left the concept ripe for manipulation by justices desiring a particular outcome in cases in which the concept plays a role. This potential for partisan harm can be mitigated if the Court adopts a more precise meaning of "hostility to religion" as referring to only that which points out instances of active animosity to religion rather than as all that is viewed as simply non-neutral toward religion.